

2012 IL App (2d) 101012-U
No. 2-10-1012
Order filed September 26, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of Lake County. |
| |) | |
| Respondent-Appellee, |) | |
| |) | |
| v. |) | No. 99-CF-4235 |
| |) | |
| JASON STRONG, |) | Honorable |
| |) | James K. Booras, |
| Petitioner-Appellant. |) | Judge, Presiding. |

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied petitioner leave to file a successive postconviction petition because petitioner failed to put forth a viable claim of actual innocence pursuant to the standard set forth by our supreme court in *Edwards*; failed to satisfy the cause-and-prejudice test; and could not establish that the State failed to disclose evidence or that he received the ineffective assistance of counsel. We affirmed the judgment of the trial court.

¶ 2 In 2000, petitioner, Jason Strong, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2008)) of an unidentified woman found in the Lake County Greenbelt Forest Preserve. We affirmed petitioner's conviction on direct appeal (*People v. Strong*, No. 2-01-0524

(2002) (unpublished order under Supreme Court Rule 23) and also affirmed the dismissal of his first petition for postconviction relief (*People v. Strong*, No. 2-03-1286 (2003) (unpublished order under Supreme Court Rule 23)). In 2006, the identity of the victim was discovered, and in 2009, a witness for the State recanted his trial testimony. In 2010, petitioner filed a motion for leave to file a successive petition for postconviction relief based on actual innocence pursuant to section 122-1(f) of the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1(f) (West 2010)). The trial court denied the motion for leave to file, and petitioner appealed, contending the trial court erred when it denied him leave to file a successive petition. On appeal, petitioner contends that (1) he stated a viable claim of actual innocence; (2) the witness's recanted testimony constituted newly discovered evidence that the State knowingly used false testimony in violation of his constitutional rights; (3) the newly discovered evidence demonstrated that the State deprived him of his constitutional rights because (a) the State failed to disclose that a witness's testimony was coerced, (b) the State provided the witness with information about the victim's murder and told the witness to include those statements in his testimony, and (c) the witness attempted to recant his testimony prior to petitioner's trial; and (4) the newly discovered evidence demonstrated that petitioner was denied the effective assistance of counsel at trial. Petitioner also urges us to assign this case to a different judge on remand, alleging that the trial court ignored applicable statutory provisions and was prejudiced toward him.

¶ 3 We issued an order affirming the trial court's determination. *People v. Strong*, 2011 IL App (2d) 101012-U. Thereafter, in a supervisory order dated May 30, 2012, our supreme court denied petitioner's leave to appeal, but directed us to reconsider our judgment in light of *People v. Edwards*, 2012 IL 111711. We allowed the parties to file supplemental briefing. Having

reconsidered our judgment pursuant to *Edwards*, we affirm the trial court's dismissal of defendant's successive postconviction petition.

¶ 4

I. BACKGROUND

¶ 5 The following facts were adduced from petitioner's trial. In 1999, an unidentified woman was found in the Lake County Greenbelt Forest Preserve. The victim's injuries indicated that she had been severely beaten and tortured before her death. Petitioner's arrest and conviction were sparked by information obtained from Jeremy Tweedy who, after his arrest, revealed to police his knowledge of the events that occurred on the night of the victim's murder.

¶ 6 After petitioner's arrest, petitioner made inculpatory written and verbal statements to law enforcement officials. Petitioner stated that he met the victim while walking back to his room at the Motor Inn motel where he lived. He described the woman to the police as white, approximately 20 years of age, five feet tall, and weighing 100 pounds. Petitioner said he brought the woman to his room to have sex, but after coming out of the bathroom, discovered her rifling through his bag. Petitioner punched the woman in the eye and hit her above the same eye with a tequila bottle. Petitioner also admitted that he poured hot wax on the victim. In addition, when petitioner was shown photographs of the crime scene, he identified areas of the body where he had poured wax on the victim. Petitioner then drove with detectives to the location where he had disposed of the body and correctly guided detectives to the place where the body was found.

¶ 7 At petitioner's trial, Tweedy testified that on the night of the murder, he observed petitioner strap a woman down to the bed, pour hot wax on her, and whip her with a cable made out of braided steel or aluminum. Other evidence adduced at trial included the testimony of Margaret Hipps, petitioner's former girlfriend, who identified a blue and white sweatshirt the victim was wearing

when found as petitioner's, and the testimony of Sonya Harper Spinel, who placed petitioner's acquaintance and a woman at petitioner's room on the night of the murder. Dr. Mark Witeck testified that he was the medical examiner who performed the autopsy on the victim. Dr. Witeck testified that the victim's injuries included a contusion on her left forehead, a subdural hematoma, and numerous burns on her body. Dr. Witeck testified that the appearance of the burns on the victim's body was consistent with the appearance of burns caused by hot wax.

¶ 8 The jury convicted petitioner of first-degree murder, and the trial court sentenced him to a term of 46 years' imprisonment. We affirmed his conviction on direct appeal. We subsequently affirmed the trial court's dismissal of petitioner's first petition for postconviction relief.

¶ 9 In 2006, the victim was identified as Mary Kate Sunderlin, who was mentally disabled. In 2007, petitioner filed a *pro se* petition for writ of *habeas corpus* in the United States District Court for the Northern District of Illinois. During that proceeding, petitioner was assigned counsel and permitted to conduct discovery regarding claims tied to newly discovered evidence. The investigation revealed that the victim associated with Correen Lewis and Tracey Lewis, both of whom had been convicted of defrauding elderly and vulnerable people. In 2000, the Lewises were arrested for attempting to withdraw funds from the victim's bank account. The investigation further revealed that the Lewises influenced the victim to marry Gonzalo Chamizo, a mentally disabled man now residing in Florida, in June 1999. The proceedings in federal court were stayed to allow petitioner to pursue a successive postconviction petition.

¶ 10 In 2001, independent of petitioner's trial and conviction, the Carpentersville police department began an investigation into the victim's disappearance in response to a missing person's report filed by the victim's family. In 2002, Chamizo told authorities that he killed the victim. He

initially said that he stabbed the victim in Cuba because his family told him to do so, and then said he killed the victim on a trip to Kentucky. Later, Chamizo told authorities that he killed the victim during a party at a house in Elgin. Thereafter, members of the Illinois-Wisconsin Search and Rescue Dog Team were sent to residences in Elgin and Carpentersville where Chamizo might have stayed in 1999, but the victim's body was not recovered at those locations. There is no indication that the Carpentersville police department and the Lake County authorities communicated until 2006 when the victim was identified.

¶ 11 In 2009, Tweedy recanted his trial testimony to petitioner's counsel. Tweedy stated that his testimony was false and he tried to recant his testimony to Lake County law enforcement officials before trial, but they coerced him to testify. According to petitioner, this information was not disclosed to him or his trial counsel.

¶ 12 In August 2010, petitioner filed a motion for leave to file successive petition for postconviction relief based on actual innocence. Petitioner alleged that the 2006 discovery of the identity of the victim and current counsel's investigation into her background, combined with Tweedy recanting his testimony, resulted in the discovery of new evidence supporting his actual innocence and his claim that he was denied the effective assistance of counsel. Petitioner also alleged his constitutional rights were violated when prosecutors permitted Tweedy to commit perjury and failed to disclose that Tweedy's testimony was coerced. Petitioner's petition further alleged that he satisfied the cause-and-prejudice test for any claims in his successive petition that did not rise to actual innocence because the information in support of his petition could not have been discovered at the time of trial, on direct appeal, or during his first postconviction proceeding. According to

petitioner, the “bulk” of this information was gathered only after petitioner’s current counsel was appointed during the federal court proceeding.

¶ 13 Attached to petitioner’s petition were 13 affidavits, including affidavits from several people investigating the victim’s disappearance, petitioner, and petitioner’s current counsel. Tweedy did not initially submit an affidavit. However, included was an affidavit from Brian Nisbet, an attorney, who averred that Tweedy told him that his testimony at petitioner’s trial was false, but Tweedy would not sign an affidavit. Petitioner also submitted an affidavit from his current counsel, who averred that he interviewed Tweedy on April 10, 2009, and Tweedy stated that he did not meet petitioner until a week after the victim was found, the police officers investigating the victim’s death coerced his testimony, and he tried to recant his statements before trial but authorities would not permit him to do so. Thereafter, Tweedy executed two affidavits dated March 21, 2012 and March 29, 2012, respectively, recanting his trial testimony.

¶ 14 Petitioner also attached affidavits from private investigators hired to investigate the victim’s death. Cynthia Estes averred that her investigation revealed that Tracy Lewis attempted to gain access to the victim’s bank account after the victim was reported missing and she later pleaded guilty to forgery; the Lewises allegedly defrauded other elderly people; the mother of petitioner’s co-defendant did not believe petitioner committed the murder; and that Carpentersville police officers told her that Chamizo had been arrested many times and that the Lewises were pathological liars. Susan Swanson, another private investigator hired by petitioner to investigate the circumstances of the victim’s death, averred that she interviewed members of the victim’s family, who told her about the victim’s relationship with the Lewises, including that Tracy Lewis attempted to obtain an ATM

card in the victim's name. Swanson further averred that her investigation revealed that Chamizo suffers from a mental disability.

¶ 15 Petitioner further attached an affidavit from Michael K. Mosier, the victim's former boyfriend, and Mosier's brother, Jimmy Mosier. Michael Mosier averred that he was familiar with the victim's relationship with the Lewises and Chamizo. Michael Mosier further averred that "Tracey Lewis might have killed [the victim], although Tracey never said anything to make me think that." Jimmy Mosier averred that "[t]en or eleven years ago, my brother, Michael Mosier, told me that he knew about a murder. The conversation took place over the telephone after I called my brother. Michael was living in Elgin, IL at the time of this conversation."

¶ 16 On September 16, 2010, after entertaining oral arguments, the trial court denied petitioner leave to file a successive postconviction petition. In denying the petition, the trial court stated:

"[U]nder the circumstances, I do not seem to be convinced that your petition for leave to file a successive post-conviction petition would be based on credible evidence. Your allegations about newly discovered evidence of actual innocence must be supported by affidavits or credible evidence. And for the matter, I don't even venture to imagine that [Tweedy] or [Chamizo] will give you affidavits.

The confession [by petitioner] was found to be credible and was corroborated *** . I cannot find in any way that this would be—would facilitate anything; that even if you were allowed to proceed with a successive post-conviction petition, that anything new would be presented, any new facts, anything credible would be presented.

Therefore, I will deny you leave to file a successive post-conviction petition."

Petitioner timely appealed.

¶ 17

II. ANALYSIS

¶ 18 Before addressing the merits, we allow petitioner's pending motion to cite additional authority, and we take note of *People v. Carballido*, 2011 IL App (2d) 090340.

¶ 19

A. Actual Innocence

¶ 20 Petitioner's first contention on appeal is that the trial court erred in denying him leave to file a successive postconviction petition because he put forth an adequate claim of actual innocence. Specifically, petitioner maintains that the trial court improperly reached the merits of his actual innocence claim rather than deciding whether petitioner presented a colorable claim of actual innocence. Petitioner also argues that he presented "two categories of evidence that were newly discovered, non-cumulative, material and that, if presented at [petitioner's] retrial, would raise reasonable doubt as to his guilt ***." According to petitioner, the two new pieces of evidence are the victim's identity and her association with people who had a history of taking advantage of her, and Tweedy's perjured testimony and subsequent recantation.

¶ 21 The Act provides a defendant with a means to challenge his or her conviction based on a substantial deprivation of federal or state constitutional rights. *People v. Tenner*, 175 Ill. 2d 372, 378 (1997). A postconviction action is a collateral attack as opposed to a direct appeal, and consequently, the Act contemplates filing only one postconviction petition. *People v. Simmons*, 388 Ill. App. 3d 599, 605 (2009). Therefore, leave of court is a condition precedent to filing a successive postconviction petition. *Id.* Pursuant to section 122-1(f) of the Act, leave of court may be granted only if the petition demonstrates cause for his or her failure to bring the claim in an initial postconviction proceeding and prejudice results from that failure. 725 ILCS 5/122-1(f) (West 2010).

¶ 22 However, our supreme court has recognized that a defendant need not establish cause and prejudice to be granted leave to file a successive petition if he or she can show a valid freestanding claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 330-31 (2009). To be successful under this theory, the evidence of actual innocence must be newly discovered; and also be material, noncumulative, of such a conclusive nature that it would probably change the result on retrial. *People v. Anderson*, 402 Ill. App. 3d 1017, 1028 (2010). We review *de novo* a trial court's dismissal of a postconviction petition without an evidentiary hearing, and therefore, we may affirm on any basis supported by the record if the judgment is correct. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 23 Our supreme court recently clarified when leave should be granted to file a successive postconviction petition based on actual innocence. In *Edwards*, the supreme court opined:

“With respect to those seeking to relax the bar against successive postconviction petitions on the basis of actual innocence, we hold today that leave of court should be denied only where it is clear from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. [Citations.] Stated differently, leave of court should be granted when the petitioner's supporting documentation raises the probability that ‘it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.’ ” *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

The supreme court reiterated that the elements of a claim of actual innocence are that the evidence in support of the claim must be newly discovered; material, as opposed to “merely cumulative”; and

of such a conclusive nature that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32. The *Edwards* court further found it appropriate to note:

“[t]he United States Supreme Court has emphasized that such claims must be supported ‘with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical evidence physical evidence—that was not presented at trial. [Citation.] The Court added: ‘Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.’ ” *Id.* (quoting *Schlup*, 513 U.S. at 324).

¶ 24 In the current matter, the evidence of the victim’s identity and Tweedy’s recanted testimony is insufficient to support a colorable claim of actual innocence. First, with respect to the victim’s identity and her association with the Lewises and Chamizo, petitioner submitted affidavits from various private investigators hired to investigate the circumstances surrounding the victim’s death. The private investigators all averred that the victim associated with the Lewises, who tried to take advantage of her and use her debit card after the victim was reported missing. The private investigators further averred that they conducted interviews with members of the victim’s family and the Carpentersville police department, who also expressed concern about the victim’s association with the Lewises and Chamizo. In addition, Michael Mosier averred that he was an acquaintance of the victim and the Lewises, and that Tracey Lewis “might” have killed the victim, although she did not say anything to him to make him think that. Jimmy Mosier averred that his brother Michael told him “ten or eleven years ago” that he knew something about a murder.

¶ 25 While the evidence presented in the above affidavits could provide an alternate theory about the victim’s death, potentially creating a reasonable doubt of petitioner’s guilt, we cannot conclude

that it is more likely than not that no reasonable juror would have convicted him. *Edwards*, 2012 IL 111711, ¶41. Noticeably absent from the submitted affidavits is an averment specifically linking the Lewises or Chamizo to the victim's death. Instead, the affidavits only demonstrate that the victim was mentally disabled, she associated with the Lewises, who had a history of taking advantage of disabled people, and that the Lewises tried to defraud the victim. The affidavits further show that the victim associated with Chamizo, who also suffered from a mental disability. Thus, the affidavits do not undermine other critical evidence that the State presented of petitioner's guilt. That evidence included petitioner's inculpatory statements, including that he poured hot wax on the victim; petitioner correctly guiding detectives to the location where the victim's body was found; testimony from Hipps, petitioner's former girlfriend, identifying the blue and white sweatshirt the victim was wearing when she was found as belonging to defendant; Spinel's testimony placing a woman at petitioner's room on the night of the murder; and Dr. Witeck's testimony that the appearance of burns on the victim's body was consistent with the appearance of burns caused by hot wax.

¶26 Second, Tweedy's recanted trial testimony is also insufficient to satisfy the actual innocence standard for obtaining leave to file a successive postconviction petition. The *Edwards* court reiterated that an element of an actual innocence claim is that the evidence be "newly discovered," and further emphasized pursuant to United States Supreme Court precedent that the new evidence must be "reliable." *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup*, 513 U.S. at 324).

¶27 In this case, Tweedy's affidavit averring that his testimony was false and that he tried to recant his testimony is neither newly discovered nor reliable. In *People v. McDonald*, 405 Ill. App. 3d 131 (2010), the petitioner sought leave to file a successive postconviction petition pursuant to

section 122-1(f) of the Act based, in part, on the recanted testimony of a witness. *Id.* at 134-35. The reviewing court rejected the petitioner's argument that the witness's recanted testimony constituted newly discovered evidence because the witness testified at trial and was extensively cross-examined, and the witness's testimony was corroborated by other evidence. *Id.* at 137. Similarly, here, Tweedy testified at trial and was subject to extensive cross-examination, during which he admitted that he feared going to jail if he did not cooperate, he initially lied to police, changed his story about the victim's death, and he tried to recant statements he made to the police but they did not believe him. See *id.*; see also *People v. Collier*, 387 Ill. App. 3d 630, 637 (2009) (rejecting an actual innocence claim based on the State's alleged use of perjured testimony because the witnesses's "changing stories" were explored at trial). Further, Tweedy's testimony that he observed petitioner pour hot wax on the victim was consistent with Dr. Witeck's testimony that the appearance of burns on the victim's body were consistent with the appearance of burns caused by hot wax. Finally, as the court in *McDonald* noted, we reiterate that, "as a general rule, recantations are deemed highly unreliable." See *McDonald*, 405 Ill. App. 3d at 137 (citing *People v. Burrows*, 172 Ill. 2d 169, 188 (1996)).

¶ 28 In sum, the evidence of the victim's identity and her association with the Lewises and Chamizo merely raises an alternate theory on the victim's death. In addition, Tweedy's recanted testimony is not newly discovered because he was subjected to extensive cross-examination at trial. Therefore, as a matter of law, this evidence does not raise the probability that it is more likely than not that *no* reasonable juror would have convicted him in light of the evidence presented in the current petition. (Emphasis added.) See *Edwards*, 2012 IL 111711, ¶ 41 (holding that the petitioner failed to raise the probability that it was more likely than not that no reasonable juror would have convicted in light of the new evidence).

¶ 29

B. Cause and Prejudice

¶ 30 Petitioner's second contention on appeal is that the trial court erred in denying his petition for leave to file a successive postconviction petition because Tweedy's recanted testimony constituted newly discovered evidence that the State knowingly permitted Tweedy to provide false testimony in violation of petitioner's constitutional rights pursuant to the fifth and fourteenth amendments to the United States Constitution and article 1, section 2 of the Illinois Constitution. In support of this contention, petitioner argues that "Tweedy's recantations provide new, non-cumulative evidence of fabrication. In 2009, for the first time, Tweedy stated that the police refused to believe that he was not involved in the victim's death and provided him details of the crime." Petitioner further argues that, although petitioner's trial counsel was unaware that Tweedy's testimony was false, the State knew or should have known that Tweedy gave false testimony because the State acknowledged at trial he was truthfully challenged and gave multiple versions of what happened to law enforcement officials.

¶ 31 A successive petition for postconviction relief can be considered on its merits if it meets the cause-and-prejudice test put forth in section 122-1(f) of the Act. See 725 ILCS 5/122-1(f) (West 2010). To satisfy this test, a petitioner must show good cause for failing to raise the claimed error in a prior proceeding and that actual prejudice resulted from the error. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). "Cause" is defined as an objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding and "prejudice" exists where the petitioner can show that the alleged constitutional error so infected his trial that the resulting conviction violated due process. *Id.* at 154.

¶ 32 Here, petitioner has not shown “cause” for failing to raise his claim that Tweedy gave false testimony in an earlier proceeding. Petitioner’s argument that Tweedy’s alleged false testimony could not have been discovered by his trial attorney is belied by the record. As noted above, the record clearly reflects that Tweedy was subject to a vigorous cross-examination during which petitioner’s trial counsel asked Tweedy a number of pointed questions regarding Tweedy’s truthfulness. Tweedy admitted lying to police and that he changed his story multiple times. For example, petitioner’s trial counsel asked Tweedy, “[i]n this case, there are many occasions when you said you were going to tell the truth and you didn’t, correct?” Tweedy responded, “That’s correct.” Later during cross-examination, Tweedy admitted that he tried to recant a statement he made to police by telling them he made the statement up, but the police did not believe him, so he did not recant his statement. In addition, Tweedy’s statement to current counsel that he testified as a result of police coercion is also not newly discovered evidence. Tweedy testified during cross-examination that he originally told his attorney he was forced to place the blame on himself because he was threatened by police officers, but then admitted “that’s also not true.” Because Tweedy’s assertion that he was lying when he proffered his trial testimony and his allegations of being subject to police coercion is not “newly discovered evidence” that constitutes cause (see *McDonald*, 405 Ill. App. 3d at 136), petitioner failed to satisfy the cause-and-prejudice test (see *People v. Balle*, 379 Ill. App. 3d 146, 151 (2008) (noting that when the petitioner is unable to establish cause, he or she fails to establish the requirements of the cause-and-prejudice test)).

¶ 33 C. *Brady* Violation

¶ 34 Petitioner’s third contention on appeal is that the trial court erred in dismissing his petition for leave to file a successive petition for postconviction relief because newly discovered evidence

shows that the State failed to disclose that Tweedy was coerced to implicate petitioner in the victim's murder, law enforcement officials told Tweedy about the nature of the crime and to include those details in his testimony, and the State failed to disclose that Tweedy tried to recant his testimony before trial. According to petitioner, the State's failure to disclose favorable evidence within its control violated his due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¶ 35 In *Brady*, the United States Supreme Court set forth the government's affirmative duty to disclose evidence favorable to a defendant. *Brady*, 373 U.S. at 87. To establish a *Brady* violation, suppressed evidence must be both favorable to the accused and material. *People v. Hobley*, 182 Ill. 2d 404, 433 (1998) (discussing an alleged *Brady* violation in the context of a successive petition for postconviction relief). Favorable evidence is material only when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, or in other words, the favorable evidence is of a " 'probability sufficient to undermine confidence in the outcome.' " *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). In making a materiality determination, a court considers the cumulative effect of all suppressed evidence favorable to the defense as opposed to considering each piece individually. *Hobley*, 182 Ill. 2d at 433. Accordingly, to succeed on a *Brady* violation, the petitioner must demonstrate (1) the undisclosed evidence is favorable because it is either exculpatory or impeaching; (2) the evidence was either willfully or inadvertently withheld by the State; and (3) withholding the evidence resulted in prejudice. *People v. Anderson*, 375 Ill. App. 3d 990, 1011 (2007).

¶ 36 The same reasons that led us to conclude that petitioner's contention that the discovery of the victim's identity and Tweedy's recanted trial testimony did not meet the actual innocence standard or the cause-and-prejudice test also lead us to conclude that petitioner's allegation the State failed

to disclose that Tweedy's testimony was coerced also must fail. Initially, we note that petitioner has waived his claim of a *Brady* violation by failing to raise it in his initial postconviction petition. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002) ("In the context of a successive [postconviction] petition *** the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the statute."). As discussed above, the veracity of Tweedy's changing statements to police and his trial testimony was thoroughly addressed by petitioner's trial counsel during cross-examination. Moreover, even assuming the State did possess evidence that Tweedy's trial testimony was coerced and petitioner could not have discovered that evidence at the time he filed his original petition for postconviction relief, petitioner fails to satisfy the materiality test required by *Brady*. See *Anderson*, 375 Ill. App. 3d at 1011-12. Even without Tweedy's testimony, the evidence against petitioner includes his inculpatory statements to law enforcement officials that he hit the victim over her eye with a tequila bottle and that he poured hot wax on her. These statements were corroborated by Dr. Witeck's testimony that the victim's injuries included a contusion on her left forehead and the appearance of burns on her body consistent with burns caused by hot wax. Petitioner also correctly led law enforcement officials to the location where the victim's body had been discovered.

¶ 37

D. Ineffective Assistance of Counsel

¶ 38 Petitioner's fourth contention on appeal is that the newly discovered evidence demonstrated that he did not receive the effective assistance of counsel at trial. According to petitioner, his trial counsel "did not conduct any independent investigation into the victim's identity." Specifically, petitioner argues that his trial counsel failed to make an independent investigation into the victim's identity and could have requested that law enforcement officials take additional steps to identify the

victim, such as requesting they enter a more detailed physical description of the victim in a national database for missing persons, obtaining a court order to determine whether the Illinois State Police were assisting local law enforcement departments in locating a missing person matching the victim's description, and ensuring that fliers containing the victim's description were distributed to every local law enforcement department within a 100-mile radius. Petitioner further maintains that "[h]ad the information concerning the Lewises and Chamizo been presented at trial, the defense would have presented compelling evidence of alternative perpetrators, including Tracey Lewis, Correen Lewis, and Gonzalo Chamizo. This new evidence would have created a 'reasonable probability' that the jury's verdict would have been different."

¶ 39 In support of this contention, petitioner attached an affidavit from Nisbet, one of petitioner's current attorneys. Nesbit averred that he spoke with petitioner's trial counsel and asked him several questions regarding what was known of the identity of the victim at the time of trial. Nesbit averred that petitioner's trial counsel told him that they had an investigator on the case, but he did not remember the defense doing anything extra to identify the victim. Nesbit averred that petitioner's trial counsel relied on the police efforts to identify the victim and reviewed all of the reports turned over by the police.

¶ 40 A defendant's right to effective assistance of counsel is provided by the sixth and fourteenth amendments to the United States Constitution. *People v. Angarola*, 387 Ill. App. 3d 732, 735 (2009) (citing U.S. Const., amends. VI, XIV). To succeed on a claim of ineffective assistance of counsel, a defendant, or in this case, the petitioner, must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). To satisfy the first prong, the petitioner must show that his trial counsel's performance was deficient because the representation fell below an objective standard of

reasonableness. *People v. Harris*, 206 Ill. 2d 1, 16 (2002) (discussing an ineffective-assistance-of-counsel claim in the context of a postconviction petition). To meet the second prong, the petitioner must demonstrate prejudice by showing that there is a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different. *Id.*

¶ 41 In assessing whether trial counsel's performance was deficient, we initially note that review of trial counsel's performance is highly deferential. *People v. Guest*, 166 Ill. 2d 381, 393 (1995). As our supreme court stated:

“ ‘Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.’ ”
Id. at 393-94 (quoting *Strickland*, 466 U.S. at 689).

Accordingly, counsel's duty is to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary, and it is reasonable for counsel to focus his strategy on the weakness of the State's case. *People v. Pecoraro*, 175 Ill. 2d 294, 324 (1997).

¶ 42 Here, the record reflects that petitioner's trial counsel made a reasonable investigation into ascertaining the victim's identity before trial. This is not a situation where petitioner's trial counsel wholly failed to investigate the victim's identity. See *People v. Tenner*, 175 Ill. 2d 372, 380 (1997). Rather, Nesbit expressly averred that petitioner's trial counsel told him his investigation into the

victim's identity involved reviewing the documents turned over to him from the State. In addition, the record is devoid of any indication that the victim's identity would have been discovered had petitioner's trial counsel attempted the methods suggested by petitioner in his current petition. Accordingly, given the deference we must afford trial counsel in determining whether his performance was deficient, we conclude that his failure to further investigate the victim's identity did not render his representation deficient, and petitioner cannot establish a claim of ineffective assistance of counsel. See *People v. Easley*, 192 Ill. 2d 307, 318 (2000) ("A defendant must satisfy both prongs of the *Strickland* test. Therefore, 'failure to establish either proposition will be fatal to the claim' [citations].)."

¶ 43 E. Substitution of Trial Court Judge

¶ 44 Petitioner's final contention on appeal is that we should assign this matter to a different judge on remand and cites *Carballido* in support of his contention. See *Carballido*, No. 2-09-0340 (Ill. App. Mar. 23, 2011). However, this case will not be remanded because we are affirming the trial court's determination to deny petitioner leave to file a successive postconviction petition. Therefore, resolution of this issue is unnecessary. See *People v. Lynch*, 151 Ill. App. 3 987, 997 (1987).

¶ 45 III. CONCLUSION

¶ 46 For the foregoing reasons, we affirm the judgment of the Lake County circuit court.

¶ 47 Affirmed.